UNITED STATES OF AMERICA
NATIONAL LABOR RELATIONS BOARD
REGION 4

WYMAN GORDON PENNSYLVANIA, LLC

and CASES 04-CA-182126
04-CA-186281
04-CA-188990

UNITED STEEL, PAPER AND FORESTRY
RUBBER, MANUFACTURING, ENERGY,
ALLIED INDUSTRIAL AND SERVICE
WORKERS INTERNATIONAL UNION, AFL-CIO-CLC

CHARGING PARTY UNITED STEEL, PAPER AND FORESTRY, RUBBER, MANUFACTURING, ENERGY, ALLIED INDUSTRIAL AND SERVICE WORKERS INTERNATIONAL UNION, AFL-CIO-CLC'S MOTION TO STRIKE PORTIONS OF RESPONDENT'S BRIEF AND EXHIBITS NOT ADMITTED

Charging Party United Steel, Paper and Forestry, Rubber, Manufacturing, Energy, Allied Industrial and Service Workers International Union, AFL-CIO-CLC ("Union") moves to strike exhibits submitted by Respondent Wyman Gordon Pennsylvania LLC with its brief in support of exceptions and also to strike all references thereto in Respondent's brief. The exhibits were not entered into evidence at the hearing, are not part of the record, and should not be considered.

It is well-established that exhibits not entered into evidence are not part of the record before the Board. *See*, *e.g.*, *S. Mail, Inc.*, 345 NLRB 644, 644 n.2 (2005) (granting motion to strike portions of respondent's brief containing "references . . . to documents and testimony which were not admitted into evidence at the hearing and are not, therefore, part of the record in this proceeding"); *Carbonex Coal Co.*, 248 NLRB 779, 784 n.1 (1980). Consideration of such documents "would deny the parties the opportunity for *voir dire* and cross-examination, and

would violate the Board's rules. *Today's Man*, 263 NLRB 332, 333 (1982), *citing* Section 102.45(b) of the Board's Rules and Regulations (granting motion to strike exhibits not entered into evidence and references thereto in party's brief).

Respondent attached two letters to its brief in support of exceptions, filed September 17, 2018, identified as Exhibit A and Exhibit B. Exhibit A appears to be a letter from Regional Director Dennis Walsh dated March 1, 2017, and Exhibit B appears to be a letter from Regional Director Dennis Walsh dated October 31, 2016. Respondent evidently had possessed these documents for more than a year at the time of the hearing, but it never moved their admission to the ALJ, and they were never admitted during the five-day hearing in this case. Consideration of these documents at this point in the proceeding would deny the parties the opportunity for *voir dire* and cross-examination, and it would violate Section 102.45(b) of the Board's Rules and Regulations, which defines the record of each case. Consequently, it is proper to strike both exhibits and all references to them in Respondent's brief. Such references appear on a number of pages, including pages 1, 10-11, 18, and 31.

In addition, while it is not attached to the Employer's brief, the Employer's brief refers throughout to a version of Employer Exhibit 3 that has been altered to include page numbers, as Respondent admits.[1] R. Br. at 5 n.4. Respondent did not introduce or move the admission of this altered version of Employer Exhibit Three. It likewise would be inappropriate to consider this document. The altered exhibit and the many references to it in Respondent's brief properly should be stricken.

Of course, it should be noted that even if the Board could properly consider "Exhibit A" and "Exhibit B", they are utterly irrelevant. A Regional Director's determinations in the course of an investigation into an unfair labor practice charge "do not constitute evidence . . . nor are

[1] Respondent attached this document to its brief to the ALJ, in addition to the letters attached as Exhibits 1 and 2. Charging Party and the General Counsel each moved to strike, and the ALJ did not rule on the motions.

they binding . . . in any other respect." *G.M. Masonry Co.*, 245 NLRB 267, 269 n.7 (1979); *see also Tramont Mfg., LLC*, 365 NLRB No. 59, slip op. at 8 (2017), *remanded in part on other grounds*, 890 F.3d 1114 (D.C. Cir. 2018) ("a determination from the Office of Appeals does not have any preclusive effect"); *Pepsi-Cola Bottlers of Atlanta*, 267 NLRB 1100, 1100 n.2 (1983) ("a prior charge which is dismissed does not constitute an adjudication on the merits and no res judicata effect can be given to the action").

Further, Exhibit A and Exhibit B are not suitable for judicial notice pursuant to Rule 201 of the Federal Rules of Evidence ("FRE 201"). Under that rule, courts may "judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned."[2] *Id.* "The threshold issue" for prospective judicial notice is "the identity of the adjudicative fact of which the court intends to take notice." *Colonial Leasing Co. v. Logistics Control Group Int'l*, 762 F.2d 454, 459 (5th Cir. 1985). "Care should be taken by the court to identify the fact it is noticing, and its justification for doing so." *Id.* When the document in question contains a number of distinct facts, as does a court decision, specifying the particular fact to be noticed "is particularly necessary." *Id.* Respondent has not even asked the Board to take judicial notice of "Exhibit A" or "Exhibit B," much less specified any particular fact to be noticed.

Even if Respondent had specified some particular fact to be noticed, judicial notice is improper because the facts are not those "not subject to a reasonable dispute." FRE 201. Respondent relies upon Exhibit A to bolster its contentions about the Respondent and its relationship with the Union. (*See* R. Br. at 18 (Union's bargaining positions on employee contributions to health insurance premiums for the 2016 plan year); 31 (nature of a quarterly bonus paid by Respondent to unit employees)). FRE 201 requires a "high degree of

[2] A court may also notice a fact that is not subject to reasonable dispute because it "is generally known within the trial court's territorial jurisdiction." FRE 201. This prong of the rule is plainly inapplicable here.

indisputability" to be subject to judicial notice. Advisory Committee's Note, FRE 201. In stark contrast to the Respondent's purported facts, the Board takes judicial notice of facts that are genuinely not subject to reasonable dispute. *See Metro-West Ambulance Servs.*, 360 NLRB 1029, 1055 & n.48 (2014) (judicial notice taken of rainfall as reported by the National Weather Service); *Bud Antle, Inc.*, 359 NLRB 1257 n.3 (2013), incorporated by reference, 361 NLRB 873 (2014) (judicial notice taken of geographic distance as shown by Google Maps).

Judicial notice is also inappropriate because a letter from a Regional Director setting forth his findings is not a suitable source for judicial notice of facts about the Respondent and its relationship with the Union. Such letters are not "sources whose accuracy cannot reasonably be questioned." FRE 201. Indeed, "courts generally cannot take notice of findings of fact from other proceedings for the truth asserted therein because these findings are disputable and usually are disputed." *Gen. Elec. Capital Corp. v. Lease Resolution Corp.*, 128 F.3d 1074, 1082 n.6 (7th Cir. 1997).

In view of the foregoing, the Union respectfully requests that the Board strike the attachments and any references to them from Respondent's brief.

Respectfully submitted,

/s/Antonia Domingo

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CERTIFICATE OF SERVICE

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